No. 06-600

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In The
# Supreme Court of the United States

CHRISTOPHER PAUL SCHNEIDER,

*Petitioner,*

v.

COMMONWEALTH OF VIRGINIA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia**

## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

When a criminal defendant repeatedly cross-examines a rape victim during a preliminary hearing and when the trial court finds that the rape victim is unavailable for trial, does the Sixth Amendment preclude the admission of the rape victim's preliminary hearing testimony?

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## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Virginia Attorney General Robert F. McDonnell, on behalf of the Commonwealth of Virginia, responds to the Petition for Writ of Certiorari.[1] For the reasons detailed in this Brief in Opposition, the Petition should be denied.

## INTRODUCTION

By "leav[ing] for another day any effort to spell out a comprehensive definition of 'testimonial,'" *Crawford v. Washington*, 541 U.S. 36, 68 (2004), this Court left certain questions unresolved. However, in the area of preliminary hearing testimony, *Crawford* was clear: testimony from a preliminary hearing is inadmissible unless: (1) the witness was unavailable; and (2) the defendant had a prior opportunity to cross-examine the witness. *Id.* at 53-54, 68. In this instance, both conditions are met. First, the trial court reasonably concluded that the rape victim was an unavailable witness. Second, because the rape victim previously testified under oath, because Schneider was present and represented by counsel during the preliminary hearing, and because Schneider had actually cross-examined the rape victim, the trial court concluded that Schneider had a prior opportunity to cross-examine the witness.

Nevertheless, Schneider asks this Court to review the Virginia court's straightforward application of *Crawford*.

[1] On December 12, 2006, this Court directed that a response be filed. On December 22, 2006, this Court extended the time for filing the response to February 12, 2007.

Certiorari should be denied for several reasons. First, Schneider's principal argument to this Court, that admitting preliminary hearing testimony violates the Confrontation Clause, U.S. Const. amend. VI, was never raised in the state courts. Instead, he expressly conceded in the state courts that his sole issue was whether the witness was properly deemed "unavailable." To ensure a fully developed record and out of comity to state courts, this Court has declined to grant certiorari when a party engages in such "bait and switch" tactics. Thus, certiorari is not available to a petitioner seeking review pursuant to 28 U.S.C. § 1257 if he fails to properly present his federal claim.

Second, there is no conflict among the lower courts. A few States have precluded the use of preliminary hearing testimony at trial because, as a matter of *state law*, those courts have concluded that the limited scope of cross-examination at preliminary hearings precludes the use of such testimony at trial. The majority, including Virginia, have held that such testimony is admissible where the defendant had a prior opportunity to cross-examine the witness.

Finally, contrary to Schneider's assertions, there is no need for this Court to review so as to adopt a "uniform standard" for determining when a witness should be deemed unavailable. Schneider does not point to any conflict among the lower courts or offer any reason for this Court to grant certiorari – except his clear desire to escape punishment for his horrendous pattern of the rape of a child. In fact, the wide range of situations that present themselves to the courts, such as the death of a witness, illness, flight, memory loss or feigned memory loss, refusal to cooperate, witness intimidation and other situations militate against any such "uniform standard." With

respect to this issue, Schneider seeks nothing more than an opportunity for error correction. Certiorari should be denied.

## STATEMENT

**1.a.** Schneider began sexually abusing his step-daughter, Christi, when she was thirteen years old. Tr. 10/03/02 at 11, 14. Christi told her therapist that Schneider raped her weekly, except when she was menstruating – when he forced her to perform fellatio on him. Tr. 12/03/02 at 37-38. Over this three year period, Christi tried to physically resist, but was unable to do so. Tr. 10/03/02 at 18. Christi told her mother that she was being abused by Schneider, but her mother did not believe her. Tr. 12/03/02 at 37-38.

Christi reported Schneider's rapes on three different occasions. Tr. 10/03/02 at 14-16; Tr. 12/03/02 at 47-48. However, Schneider was never charged because Christi recanted each time. Tr. 10/03/02 at 14-15; Tr. 12/03/02 at 47-48. Christi explained she had recanted because of pressure from Schneider, her mother's refusal to believe her, and the fact that her mother and her brother loved Schneider and did not want to lose him. Tr. 10/03/02 at 14-16; Tr. 12/03/02 at 47-48.

**b.** On April 25, 2002, when Christi was sixteen years old, she confided in her therapist, Joyce Costigan, that Schneider had been raping her over a period of years. Tr. 12/03/02 at 33-34, 37, 45. Costigan, who was required by law to do so, told Christi she would have to report the abuse right away. Tr. 12/03/02 at 38, 50. Christi asked Costigan to wait until she had evidence to support her allegation. Tr. 12/03/02 at 50 Christi told Costigan that

her mom would be going away that evening and that Schneider would rape her again that night. Tr. 12/03/02 at 38. Christi had decided to obtain physical evidence to prove the rapes and to persuade her mother of what was occurring. Tr. 10/03/02 at 14, 16; Tr. 12/03/02 at 49-50. Costigan agreed to wait because of Christi's prior recantations, but told Christi she would call that evening to report the abuse. Tr. 12/03/02 at 38, 50.

That evening, when Christi's mother left the house, Schneider told her to come upstairs and sit on the bed. Tr. 10/03/02 at 7. Schneider grabbed her breasts, began kissing and fondling Christi, and then told her to take off her clothes. Tr. 10/03/02 at 7. Christi complied with Schneider's order. Tr. 10/03/02 at 7. Thereafter, he proceeded to have sexual intercourse with her. Tr. 10/03/02 at 7-8. When he was done, he ejaculated on Christi's stomach. Tr. 10/03/02 at 7-9.

Schneider got a washcloth and told her to wipe off her stomach. Tr. 10/03/02 at 9. As she had planned, Christi pretended to wipe the ejaculate off her stomach, tossed the washcloth back to Schneider and put her clothes on. Tr. 10/03/02 at 9. Christi told Schneider she was going to bed, but instead she ran to a neighbor's house where she called Costigan and told her, "He did it. He raped me." Tr. 10/03/02 at 9; Tr. 12/03/02 at 39. Costigan told Christi to stay where she was while Costigan called the police. Tr. 10/03/02 at 9-10; Tr. 12/03/02 at 39.

When the police arrived, the officer noticed "a wet spot with a whitish-type color on her" stomach. Tr. 12/03/02 at 57. Christi had kept Schneider's semen as evidence on her stomach. Tr. 12/03/02 at 57-58, 69-70. The police took Christi to have a rape kit test done and the semen on her

stomach was obtained for DNA analysis. Tr. 10/03/02 at 10; Tr. 12/03/02 55-56, 62, 69-71. The sexual assault nurse examiner also conducted a physical exam. Tr. 12/03/02 at 63. The nurse reported that although the exam was "inconclusive," the tissue on Christi's cervix was irritated and "friable" at the time of the exam. Tr. 12/03/02 at 65. The DNA sample was a conclusive match to Schneider. Tr. 10/03/02 at 19; Tr. 12/03/02 at 32, 72-75; Commonwealth's Exhibit 1. Schneider stipulated to the DNA report at trial. Tr. 12/03/02 at 32.

**c.** Christi has been diagnosed with bipolar disorder, manic depression and attention deficit hyperactivity disorder. Tr. 12/03/02 at 20. She had been seeing the therapist, Costigan, for approximately two years at the time of the incident. Tr. 12/03/02 at 33, 40. When Christi was nine years old, she was hospitalized for over a year for mental health issues. Tr. 12/03/02 at 20-21. In addition, Christi had been removed from her home in the past because of physical abuse. Tr. 12/03/02 at 98. By the time of trial, Christi had been sent to live with a woman whom she had not met previously and was forced to change schools. Tr. 12/03/02 at 18-20, 96. Meanwhile, Schneider was living in the family home. Tr. 12/03/02 at 95-96.

**2.** Schneider was charged with rape in violation of *Virginia Code* § 18.2-61. *App.* 9. At the October 3, 2002 preliminary hearing in the Virginia Beach Juvenile and Domestic Relations Court, Christi testified against Schneider. Tr. 10/03/02 at 4-21. Christi testified under oath and was subjected to direct examination, cross-examination, redirect, re-cross, and, after a second redirect, further recross-examination. Tr. 10/03/02 at 4-21.

**a.** During Schneider's counsel's cross-examination of Christi, he attempted to show that she had initiated the encounter in order to "set up" Schneider.[2] Specifically, counsel asked Christi if she, a sixteen-year-old girl, had "come on" to Schneider that night. Tr. 10/03/02 at 11. Christi denied this allegation. Tr. 10/03/02 at 11. Nevertheless, Christi admitted she had "planned" the April 25, 2002 encounter in advance and told her therapist she was going to do it to gather evidence. Tr. 10/03/02 at 12, 14. Christi explained that her plan was to preserve evidence of Schneider's abuse, "so that it wouldn't happen again." Tr. 10/03/02 at 14, 16. Christi conceded she took off her own clothes and that Schneider did not force, threaten or hurt her. Tr. 10/03/02 at 13. During the preliminary hearing, Christi also admitted she had made similar allegations against Schneider on three prior occasions but had subsequently recanted. Thus, no criminal charges had been brought against Schneider on those occasions. Tr. 10/03/02 at 14-15. On further cross-examination, Christi agreed this particular occasion was "voluntary" and she did not have to go to Schneider's bedroom when he called her. Tr. 10/03/02 at 17-18. Finally, Christi admitted Schneider had never threatened her. Tr. 10/03/02 at 19.

**b.** At the conclusion of the preliminary hearing, the trial court certified the case to the grand jury. Tr. 10/03/02 at 19.

**3.** Schneider was tried in a bench trial in the Circuit Court of the City of Virginia Beach. *App.* 9.

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[2] No motivation for such a "set up" was ever suggested either at the preliminary hearing or at trial.

**a.** At trial, the prosecution produced Christi, who was sworn and answered background questions. Tr. 12/03/02 at 15-16. When asked why she did not have a good relationship with Schneider, Christi stated, "I don't feel comfortable testifying." Tr. 12/03/02 at 16. The prosecutor asked, "Christi, are you saying that you are not going to testify about what has taken place between – or what your stepfather has done with you?" Tr. 12/03/02 at 17. Christi responded, "Yes." Tr. 12/03/02 at 17. The prosecutor stated, "Christi, do you understand that you are under a subpoena which is a court order to testify?" Christi responded, "Yeah." When asked why she would not testify, she stated, "I cannot handle it mentally. I don't think I'm capable of handling it. . . . It's stressful, and I just – it's just hard and I'm not going to do it." Tr. 12/03/02 at 17.

Thereafter, the prosecutor asked Christi, "do you understand that the court can order you directly to testify?" and Christi responded, "Yes, ma'am." Tr. 12/03/02 at 22. Christi affirmed she understood that there were consequences for refusal to testify and that she understood the consequences. Tr. 12/03/02 at 22. When asked what she understood those consequences to be she stated, "Possible fines. Possible [Detention in a Home for Juveniles]." Tr. 12/03/02 at 22. Based upon that response, the prosecutor inquired, "Christi, with that in mind, will you testify today about what took place – what your stepfather has done to you over the past few years?" Tr. 12/03/02 at 21-22. Christi stated, "No, ma'am." Tr. 12/03/02 at 22.

**b.** At that point, the prosecution asked the court to order Christi to testify. Tr. 12/03/02 at 22. The court said, "Christi, do you understand that the charges here are very serious felony charges?" and Christi acknowledged she understood. Tr. 12/03/02 at 22. The judge told Christi,

"either the allegations you made are true, in which case the court needs to hear what happened; or they're not true, in which case you're in trouble. Do you understand that?" Tr. 12/03/02 at 22. Christi responded, "Yes, ma'am." Tr. 12/03/02 at 22. The trial court continued by asking her, "[D]o you understand that if these things happened, you are not the bad person here?" and Christi stated again, "Yes, ma'am." Tr. 12/03/02 at 22. Ultimately, the trial court demanded, "You need to testify, and I'm ordering you to testify about what happened." Tr. 12/03/02 at 22. In the face of the trial court's order, Christi responded, "I won't do it." Tr. 12/03/02 at 22.

**c.** In response, the prosecution requested that Christi be declared an unavailable witness, as it was clear that "despite the court's order, she refuses to testify." Tr. 12/03/02 at 22-23. The prosecutor argued:

> [t]he Commonwealth has done everything possible. We have gotten her here. I have met with her in advance. I have explained, as the court could see from her testimony, what the consequences of not testifying would be – or from her statements, I should say – what the consequences of not testifying about her stepfather's actions would be; and yet she still continues to refuse.

Tr. 12/03/02 at 23.

The prosecution moved the trial court to admit the transcript of her prior testimony from the preliminary hearing into the record. Tr. 12/03/02 at 23. In support of the request, the prosecutor noted that the preliminary hearing was under oath, Schneider was present, and "[h]e was represented not only by counsel, but by Mr. Cardon,"

the very same attorney representing him at trial. Tr. 12/03/02 at 23. The prosecutor further argued that:

> [A]s th[e] record will reveal, [defense counsel] had ample opportunity to cross-examine not only about the events of April 25th, but defense counsel opened the door to prior events; and so those matters were discussed. And when I say ample opportunity, I would note that the defense was able to cross-examine, recross, and then recross a second time; so three opportunities to examine.

Tr. 12/03/02 at 23.

Thereafter, the trial court asked defense counsel whether he had any questions for the victim, and defense counsel answered, "I have no questions for her." Tr. 12/03/02 at 24. The court then reviewed the preliminary hearing transcript, specifically to ascertain the extent of the cross-examination conducted. Tr. 12/03/02 at 25, 29-30.

**d.** Before ruling on the prosecution's motion, however, the trial court attempted to persuade Christi to testify. To that end, the trial court instructed the deputy to take her to the lockup. Tr. 12/03/02 at 25. Once Christi was locked in a cell, the court noted, "maybe a half hour sitting back in a cell will change her mind . . . that will give her a chance to reflect on what she's done." Tr. 12/03/02 at 25. The trial court left Christi in the lockup for thirty-five minutes. Tr. 12/03/02 at 26. The trial court brought her out and told her, "Christi it's been about . . . thirty five minutes since you've been in the back. Have you changed your mind?" The witness responded "No, ma'am." Tr. 12/03/02 at 26. The trial court went on to ask "So you still refuse to testify?" She replied "Yes ma'am." Tr. 12/03/02 at 26.

The trial court once again asked the prosecution and defense counsel whether either of them had any questions for the witness. Tr. 12/03/02 at 26-27. Neither the prosecutor nor defense counsel had any questions for Christi. Tr. 12/03/02 at 27. Nonetheless, the trial court sent Christi back to the lockup once more – where she remained until the conclusion of the trial. Tr. 12/03/02 at 27, 115-16.

**e.** While Christi was in the lockup, the trial court, defense counsel and the prosecutor reviewed relevant case law and after doing so, defense counsel admitted that, "in reviewing these cases, it looks like it comes down to the discretion of the court – what the court decides it should do." Tr. 12/03/02 at 27. Although defense counsel said it was important that he be permitted to cross-examine Christi, he never attempted to do so and did not proffer to the trial court the alleged inconsistencies with her preliminary hearing testimony or the substance of the allegedly new information. Tr. 12/03/02 at 27-28. Indeed, counsel specifically stated he did not have any questions for Christi when offered the opportunity by the trial court. Tr. 12/03/02 at 24, 27. After further argument of counsel, the trial court determined Christi was, in fact, unavailable. Tr. 12/03/02 at 29. The trial court found that Christi's testimony at the preliminary hearing was given under oath; that it was accurately recorded by transcript; that Schneider was present at the preliminary hearing and represented by counsel; and that he was afforded the opportunity of cross-examination when Christi testified at the preliminary hearing. Tr. 12/03/02 at 28. Thus, the trial court found that Christi was unavailable for trial and received into evidence the transcript of her preliminary hearing testimony. Tr. 12/03/02 at 27-31.

**f.** At the conclusion of the bench trial, the trial court convicted Schneider, *App.* 10, and subsequently sentenced him to serve twenty-five years in prison, with thirteen years suspended. *App.* 12.

**4.** Schneider appealed to Virginia's intermediate appellate court. The focal point of his appeal was his argument that the trial court erred in concluding that Christi was unavailable to testify and, therefore, his rights under the Confrontation Clause were violated. By published opinion, the Court of Appeals of Virginia affirmed his convictions. *App.* 1-8. The intermediate appellate court noted that even prior to this Court's decision in *Crawford*, Virginia required the prosecution to show "unavailability and an opportunity for cross-examination" before testimony from a preliminary hearing could be admitted at trial. *App.* 5. The tribunal also observed that Schneider conceded he had had a prior opportunity to cross-examine the witness. *App.* 5. Ultimately, the appellate court held that Christi's repeated refusals to testify despite the trial court's order that she testify, combined with her being placed for a time in the lockup, rendered her unavailable. Therefore, under the Virginia state law precedent, the trial court properly deemed her unavailable and permitted the prosecution to adduce the preliminary hearing testimony. *App.* 5-8.

**5.** Schneider then sought discretionary review by the Supreme Court of Virginia. On August 1, 2006, by unpublished order without explanation, that court refused the petition for appeal. *App.* 14. The Petition for Certiorari followed.

## REASONS FOR DENYING THE PETITION

The Petition should be denied for three reasons. First, Schneider did not present his current federal claim – that the Confrontation Clause precludes the prosecution from employing preliminary hearing testimony at trial – in the lower courts. Second, there is no conflict among the lower courts regarding *Crawford*'s application to the use of preliminary hearing testimony. Third, Schneider presents this Court no reason to review the state courts' determination regarding the unavailability of the witness. For all these reasons, certiorari should be denied.

### I. SCHNEIDER NEVER RAISED HIS CURRENT ATTACK ON THE ADMISSIBILITY OF PRELIMINARY HEARING TESTIMONY IN STATE COURT.

In his Petition for Certiorari, Schneider devotes the majority of his argument to a general attack on the admissibility of preliminary hearing testimony in a trial. Pet. at 6-11. However, he never raised those contentions in state court. Instead, he focused exclusively on whether the trial court correctly found the victim to be an unavailable witness. He conceded he had the opportunity to cross-examine the victim at the preliminary hearing.

With "very rare exceptions," when reviewing state-court judgments under 28 U.S.C. § 1257, this Court will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision a petitioner asks this Court to review. *Adams v. Robertson,* 520 U.S. 83, 86 (1997) (per curiam); *Yee v. Escondido*, 503 U.S. 519, 533 (1992). Moreover, this Court's Rules require the petitioner

to specify "the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts." SUP. CT. R. 14.1(g)(i). Applying these principles, this Court "has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). *See also University of California Regents v. Bakke*, 438 U.S. 265, 283 (1978) (Powell, J., announcing the judgment of the Court); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Moore v. Illinois*, 408 U.S. 786, 799 (1972); *Stanley v. Illinois*, 405 U.S. 645, 658, n.10 (1972); *Hill v. California*, 401 U.S. 797 (1971). Requiring a party to present the argument to the state courts before seeking certiorari not only respects the comity that the States and National Government owe each other, it also ensures that the record is adequately developed to enable this Court to address the issues presented. *See Webb v. Webb*, 451 U.S. 493, 500-01 (1981).

While Schneider did raise a Confrontation Clause issue on appeal – whether the victim was unavailable – he never contended in state court that the preliminary hearing testimony should not be admitted in a criminal trial. *App.* 1-8. In fact, Schneider expressly and repeatedly limited the scope of his Confrontation Clause challenge to whether the trial court properly determined that the victim was an unavailable witness. *See* Def.'s Br. Supp. Mot. to Set Aside Finding of Guilty at 5, *Commonwealth v. Schneider*, No. CR02-3390; Tr. 5/28/03 at 9; *App.* 1, 5; Petition for Appeal at 6, *Schneider v. Commonwealth*, No. 060470 (Va. Aug. 1, 2006). Indeed, the first sentence of the

lower court's opinion makes plain the manner in which Schneider framed the issue for the state court: "The *sole* issue here for determination is whether the trial court erred in finding a witness was 'unavailable' and in consequently admitting into evidence a transcript of her preliminary hearing testimony at trial." *App.* 1 (emphasis added). In its analysis of the case, the court below reiterated that "appellant challenges only the finding of unavailability" and the court limited its ruling to that issue. *App.* 5. "When the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Board of Dirs. of Rotary Int'l v. Rotary Club,* 481 U.S. 537, 550 (1987) (internal quotations and citations omitted). Because Schneider expressly limited his Confrontation challenge in state court, he cannot raise a different challenge in this Court.[3]

Moreover, the record belies Schneider's suggestion that he did not have a meaningful opportunity to cross-examine Christi at the preliminary hearing. Schneider's counsel engaged in no less than three rounds of questioning. Tr. 10/03/02 at 11-13, 16-19. Notwithstanding Schneider's assertions to the contrary, Pet. at 8, Christi's prior

[3] Furthermore, given Schneider's express concession in the trial court that he was contesting only the determination of "unavailability," Virginia's appellate courts would not have considered the issues he now seeks to raise in this Court. *See* VIRGINIA SUP. CT. R. 5:25; 5A:18. Thus, the State's procedural rules provide an independent and adequate state law ground for not considering the question presented. *See Hathorn v. Lovorn,* 457 U.S. 255, 262 (1982) (noting failure to comply with a state procedural rule may constitute an independent and adequate state ground barring review of a federal question).

recantations of similar allegations were revealed and the reasons for those recantations explored at the preliminary hearing. Christi admitted she had recanted three times prior to the report giving rise to the instant conviction. Tr. 10/03/02 at 14-15. Indeed, the trial court expressly noted these recantations in pronouncing sentence. Tr. 5/28/03 at 76. In addition, his suggestion that he did not discover (or could not have discovered in the exercise of reasonable diligence) that Sheila Richards had impeachment information prior to the preliminary hearing strains credulity. Pet. at 8. The record discloses that Christi allegedly "bragged" to Richards that she had "set him up" nearly six months prior to the preliminary hearing. Tr. 12/03/02 at 86-87. Richards, Christi's mother's self-described "best friend," was surely someone known to Schneider. Tr. 12/03/02 at 84. It is unlikely that defense counsel's use of the phrase "set up" during his cross-examination of Christi was coincidental. Tr. 10/03/02 at 12.

Finally, the trial court asked Schneider's counsel not once, but twice, whether he had any questions for Christi before declaring her unavailable. Tr. 12/03/02 at 24, 26-27. Each time, counsel responded that he had no questions. Tr. 12/03/02 at 24, 27. Having expressly declined the opportunity to put any questions to Christi, Schneider should not now be heard to complain that he was unable to do so.

Given Schneider's failure to present his general attack on the admissibility of preliminary hearing testimony in the state courts, this case represents a poor vehicle to address Schneider's argument. Moreover, the record does not support his factual contentions. Therefore, certiorari should be denied.

## II. THERE IS NO CONFLICT AMONG THE LOWER COURTS REGARDING THE ADMISSIBILITY OF PRELIMINARY HEARING TESTIMONY UNDER *CRAWFORD*.

### A. *Crawford* Is Clear Regarding the Use of Preliminary Hearing Testimony.

In *Crawford*, this Court revisited its framework for analyzing Confrontation Clause issues. The Court held that to admit into evidence the "testimonial" prior statements of a witness, there must be "unavailability and a prior opportunity for cross-examination." 541 U.S. at 68. Although the Court declined to fashion a definition of the term testimonial, it unequivocally included preliminary hearing testimony as falling within the definition of testimonial statements. *Id.* Thus, in the area of preliminary hearing testimony, no new rule was announced. While disavowing the reasoning of *Ohio v. Roberts*, 448 U.S. 56 (1980), this Court embraced the outcome of its prior cases. *Id.* at 59.

*California v. Green*, 399 U.S. 149 (1970), is dispositive of the case at bar. In *Green*, the Court held that the preliminary hearing testimony of a witness who suffered a "memory lapse" at trial was admissible. *Id.* at 165. The Court found that the witness's statement was

> given under circumstances closely approximating those that surround the typical trial. [The witness] was under oath; respondent was represented by counsel – the same counsel in fact who later represented him at the trial; respondent had every opportunity to cross-examine [the witness] as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings.

*Id.* at 165. The Court acknowledged the difference between a preliminary hearing and a trial, but concluded that "in the present case, respondent's counsel does not appear to have been significantly limited in any way in the scope or nature of his cross-examination of the witness . . . at the preliminary hearing." *Id.* at 166.

Under longstanding precedent, the witness in the case at bar was correctly deemed "unavailable" to testify at trial and Schneider had an extensive opportunity to cross, re-cross and re-re-cross the witness at the preliminary hearing. Therefore, Schneider's Confrontation rights were not violated when the trial court considered the preliminary hearing testimony.

### B. The States Have Been Consistent in Their Application of *Crawford*'s Principles to Preliminary Hearing Testimony.

Schneider contends that there is a split among the States regarding the admissibility of preliminary hearing testimony. Pet. at 9. In fact, there is no conflict. The States admit or exclude preliminary hearing testimony depending on the scope afforded for cross-examination at such hearings under state law. Where, as here, defense counsel is afforded a full opportunity to cross-examine, States have permitted the admission of preliminary hearing testimony for a witness who has become unavailable. *See New Mexico v. Henderson*, 136 P.3d 1005, 1010 (N.M. App.), *cert. denied,* 127 S. Ct. 503 (2006) (preliminary hearing testimony properly admitted because defendant "was given an unrestricted right to cross-examine the statements [the witness] gave at the preliminary hearing which were later admitted at trial. This satisfied *Crawford*."); *Kansas v. Young*, 87 P.3d 308, 316-17 (Kan.

2004) (preliminary hearing testimony admissible because defendant had the opportunity to cross-examine); *Primeaux v. Oklahoma*, 88 P.3d 893, 905 (Okla. App.), *cert. denied*, 543 U.S. 944 (2004) (preliminary hearing testimony is admissible where such "'testimony was given under circumstances which closely approximated those of a typical trial'") (citation omitted).

In contrast, where state law limits a criminal defendant's ability or opportunity to cross-examine, courts have adhered to the strictures of *Crawford* and declined to admit such testimony. *See Wisconsin v. Stuart*, 695 N.W.2d 259, 266 (Wis. 2005) (holding that because state law limited cross-examination to issues of plausibility, not credibility, use of preliminary hearing testimony at a later trial creates a Confrontation Clause problem); *Colorado v. Fry*, 92 P.3d 970, 977 (Colo. 2004) (holding that because "the opportunity for cross-examination at a preliminary hearing is very limited" under Colorado law, the admission of preliminary hearing testimony was impermissible).

New Mexico's intermediate appellate court recognized that the decisions in *Fry* and *Stuart* hinged on the state law restrictions for preliminary hearings in Colorado and Wisconsin. That court noted that *Fry* and *Stuart* "are not contrary to our holding here [admitting the preliminary hearing testimony of an unavailable witness] because both relied on the fact that the applicable procedural rules governing preliminary hearings barred the defendant from fully cross-examining the witness, particularly on matters of credibility." *Henderson*, 136 P.3d at 1010. Most recently, in *Washington v. Mohamed*, 130 P.3d 401, 403 (Wash. App. 2006), Washington's intermediate appellate court held that the pretrial hearing at issue was not limited like the one in *Fry*, because the defendant had ample opportunity at

the preliminary hearing to examine the witness who was unavailable at trial. *Mohamed*, 130 P.3d at 404.

Stated differently, courts look at the latitude afforded by state law during the preliminary hearing cross-examination and determine whether the prior testimony of an unavailable witness can be admitted. The trial judge in the case at bar actually took this precaution to evaluate the scope of the cross-examination at the preliminary hearing before the prosecution was permitted to introduce Christi's prior testimony into evidence. Tr. 12/03/02 at 25, 29-30. Careful examination of the cases shows that the "split" imagined by Schneider is in reality a function of differences in state law, rather than a divergence of opinion concerning this Court's holding in *Crawford*. With respect to preliminary hearing testimony, *Crawford* is clear and States have adhered to its strictures. Schneider offers a solution in search of a problem. No further amplification or clarification is required.

Schneider offers a number of policy arguments in support of his contention that preliminary hearing testimony should *never* be admitted. His arguments, however, contradict settled – and recently reaffirmed – precedent. Indeed, Schneider's arguments would result in nothing less than overruling *Crawford*, *Green*, and *Mattox v. United States*, 156 U.S. 237 (1895). Schneider notes that witness examinations at preliminary hearings are often less searching than at trial.[4] Pet. at 6. The Court

[4] Schneider also complains that the timing of discovery may preclude inquiry on a particular topic. However, a defendant has no constitutional right to discovery. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). Discovery was unknown at the time of the Framing. It is the

(Continued on following page)

acknowledged this obvious fact in *Green*, but concluded that if a defendant is afforded broad opportunity to cross-examine, there is no reason why the preliminary hearing testimony should be excluded if the witness later becomes unavailable. *Green*, 399 U.S. at 166. Where, as here, a criminal defendant is given extensive opportunity for cross-examination at the preliminary hearing, "nothing in the Confrontation Clause prohibit[s] the State" from relying on the prior testimony to prove its case against the defendant. *Id.* at 168.

Schneider also contends that use of the preliminary hearing testimony deprives the fact finder at trial of the opportunity to observe the witness's demeanor and precludes a defendant from questioning a witness if new facts are developed either in discovery or through independent investigation. Pet. at 6-8. Of course, that is true in every instance where prior testimony is employed. Taking this argument to its logical conclusion, prior testimony, even from a prior trial, could never be adduced once a witness becomes unavailable. In addition, the fact finder in this case plainly had the opportunity to observe Christi. What is more, the trial judge was so concerned with Christi's emotional state, that she had Christi's therapist meet with her at the conclusion of the trial. Tr. 12/03/02 at 29, 52, 67, 100-01. Therefore, this case simply does not provide an opportunity to determine the parameters of this potential shortcoming.

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opportunity to cross-examine that matters for constitutional purposes, not the timing of discovery disclosures. Essentially, Schneider seeks to constitutionalize an enhanced opportunity for cross-examination based on non-constitutional discovery rules.

More importantly, this Court has long recognized that "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). Thus, more than a century ago the Court was mindful that

> [G]eneral rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law, in its wisdom, declares that the rights of the public shall not be *wholly* sacrificed in order that an incidental benefit may be preserved to the accused.

*Mattox*, 156 U.S. at 243 (emphasis added). "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." *Id.* at 244.

Schneider also claims that "allowing preliminary hearing testimony to be admitted in lieu of actual testimony at trial sets a dangerous precedent ripe for abuse." Pet. at 9. This Court has explicitly endorsed the use of preliminary hearing testimony, provided the defendant has been afforded the opportunity to cross-examine, since 1970. *Green*, 399 U.S. at 149. Schneider does not show, and the respondent is not aware of, any such cases, let alone an epidemic of unscrupulous prosecutors who are circumventing the Confrontation

Clause through the inappropriate use of preliminary hearing testimony. More fundamentally, a defendant who was able to fully cross-examine the victim, as in the case at bar, has received his constitutional due.[6]

This Court's jurisprudence provides proper safeguards for a defendant's right to confront witnesses in preliminary hearings. That standard has been correctly and consistently applied by the States. The Petition for Certiorari should be denied.

## III. SCHNEIDER OFFERS NO REASON FOR THIS COURT TO GRANT HIS PETITION ON THE LIMITED ISSUE THAT HE ACTUALLY RAISED BELOW.

The final portion of the Petition invites the Court to "adopt a uniform standard for determining when a witness is 'unavailable.'" Pet. at 14. Schneider contends that the trial court erred in concluding that the victim in his case was "unavailable." He suggests that "death or some other meritorious reason" should constitute the standard for "unavailability." Pet. at 9. Unlike his other arguments, Schneider did raise this issue in state court. However, his contentions are without merit.

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[6] Schneider's petition also ignores the natural consequences that would flow from the adoption of his proposed rule. If the prosecution could never present preliminary hearing testimony, it would create an incentive to ensure the silence of prosecution witnesses through intimidation or worse.

### A. There Is No Demonstrated Need For a "Uniform Standard."

At the threshold, Schneider does not demonstrate any reason for this Court to address this issue. He has not articulated any conflict among the lower courts on this issue or shown that this is an area in which guidance from this Court is needed. Furthermore, Schneider's suggested approach contravenes the holding in *Green*. In *Green*, this Court held that the Confrontation Clause does not bar the use of preliminary hearing testimony in the face of a witness's claimed loss of memory, claim of privilege or *simple refusal to answer*, provided the preliminary hearing afforded the defendant an opportunity to cross-examine the witness. *Id.* at 167-68 (emphasis added).

Finally, as a conceptual matter, Schneider's suggested (but unarticulated) "uniform standard" is unsuitable for an area of the law that requires flexibility. When a reliable source testifies that a particular witness has died or left the country, such testimony should ordinarily suffice for a finding of unavailability. Other situations may require a more searching inquiry of the facts to ensure a witness is truly unavailable. For example, a hardened criminal may need significant pressure from a court to determine that he truly refuses to testify and thus be declared unavailable. In contrast, a young girl, such as the rape victim in this case, may require less pressure before the trial court is assured the witness truly refuses to testify. Each case must turn on its own facts and circumstances. The trial courts, which have the opportunity to see the witness, are the appropriate fora to determine whether a witness is unavailable and should be vested with the discretion to make that determination.

### B. There Was No Error in This Case.

Schneider further argues that the trial court should have exercised its contempt power or should have placed Christi in custody for a more "meaningful" period. Pet. at 12-13. Schneider's arguments on this point expose his Petition for what it is: a request that this Court intervene to engage in routine error-correction.

Reviewing routine cases for error-correction is not the function of this Court. A writ of certiorari will be granted only for "compelling reasons." SUP. CT. R. 10. Although Virginia maintains no error occurred, at most, Schneider's claim is nothing more than "the misapplication of a properly stated rule of law." *Id.* Such petitions are "rarely granted," *id.,* because this Court simply cannot devote itself to case-specific error correction. *See Tory v. Cochran*, 544 U.S. 734, 739 (2005) (Thomas, J., joined by Scalia, J., dissenting) (noting that the Court does not grant review for "case-specific error correction"); *Overton v. Ohio,* 534 U.S. 982, 985 (2001) (Breyer, J.) (statement respecting denial of certiorari) (noting that it is "axiomatic that this Court cannot devote itself to error correction . . . ."); *Calderon v. Thompson,* 523 U.S. 538, 569 (1998) (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting) (same).

Even if this Court were tempted to engage in such routine appellate review, no abuse of discretion occurred in the case at bar. The prosecution produced the witness and she was sworn. Therefore, the case at bar is unlike the situation in *Barber v. Page*, 390 U.S. 719, 724-25 (1968) (holding witness cannot be declared unavailable where the

prosecution has made no effort to secure the presence of the witness).

Christi, a seventeen-year-old girl, refused to testify. She explained her refusal, stating "I cannot handle it mentally. I don't think I'm capable of handling it." Tr. 12/03/02 at 17. She noted "[i]t's stressful, and I just – it's just hard; and I'm not going to do it." Tr. 12/03/02 at 17. The prosecutor asked her a number of questions about her situation and asked her if she understood there could be consequences for not testifying. Tr. 12/03/02 at 17-22. The court also questioned the witness and ordered her to testify. Tr. 12/03/02 at 22. The prosecutor asked the court to declare that the witness was unavailable. Tr. 12/03/02 at 22-23. The court refused, and sent the witness to the lockup. Tr. 12/03/02 at 25. After allowing seventeen-year-old Christi to sit in a cell for over half-an-hour, the court again inquired of Christi whether she would testify and again she refused. Tr. 12/03/02 at 26. At that point, the court declared the witness was unavailable but, in fact, held her in lockup for the duration of the trial. Tr. 12/03/02 at 27-29, 100-01, 115-16.

Schneider's suggestion that the trial court should have treated this seventeen-year-old victim more harshly before declaring her unavailable is unsupported by the record. Pet. at 13. The record reveals Christi was visibly upset and tearful at both the preliminary hearing and trial. Tr. 10/03/02 at 15; Tr. 12/03/02 at 29. At the hearing on Schneider's motion to set aside the finding of guilt, the trial court noted "[t]his is someone who's having problems, who's not living at home, who's living with another family." Tr. 5/28/03 at 29. The court also reiterated:

> She refused to testify. She was aware of the penalties for refusing to testify. She was ordered by the court to testify. She was taken in the back to lockup, given a chance to think about it, brought back out in the courtroom again and asked if she would testify; and she refused to testify again. That is sufficient pressure to . . . find her unavailable.

Tr. 5/28/03 at 33-34. The trial court's conclusion that the witness was unavailable under these circumstances constituted a reasonable exercise of the court's discretion.

Under the decision in *Sapp v. Virginia*, 559 S.E.2d 645, 649 (Va. 2002), a trial court must exert judicial pressure upon a witness who refuses to testify. This holding is consistent with FED. R. EVID. 804(a)(2), which allows a court to find a witness unavailable where the witness refuses to testify despite a court order. The plain text of the federal rule does not require a court to hold the witness in contempt. There is no reason state courts should be required to reflexively deploy the sledgehammer of contempt before declaring a witness unavailable. Nor is there any reason to grant certiorari to review a routine case based upon settled principles of law.

## CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be **DENIED**.

Respectfully submitted,

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